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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

REPLY COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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SUMMARY

Many commenting parties expressed concern that the policy undergirding the proposed competitive bidding rules may undermine the public interest and Universal Service objectives affirmed in Congress' grant of authority for auctioning the spectrum. All the parties that provide local exchange service to rural areas echo NTCA's request that the Commission fashion rules that provide viable opportunities for rural telephone companies to provide service and ensure that rural areas receive spectrum-based services.

NTCA and many others agree that multiple workable alternatives will be required to assure that the Commission satisfy its continuing obligations to assure Universal Service and to conform with the dual directives contained in Subsections (j)(3) & (4). The statutory mandates will not be attained without a variety of preferential measures including the set-aside of Blocks C and D. These measures are required to offset the potential adverse effect of spectrum sales on universally available and affordable telecommunications services and public access to the public spectrum resource. Without multiple measures, the public interest will suffer. Licenses will not be disseminated to a wide variety of applicants but concentrated in the hands of a few with "deep pockets." Service will not be quickly deployed in rural areas but will be concentrated in the most densely populated urban areas. Further,

competition will not be fostered. In sum, without effective alternative preferences, the Commission may set up a process capable of raising huge sums of money in auctions, but only at the expense of ignoring other Congressional objectives in Subsection 309(j) and violating the statutory mandate in Subsections 309(j)(3)(A) & (4). The mandate prohibits the Commission from basing a finding of public interest, convenience, and necessity on the expectation of Federal revenues for competitive bidding when it prescribes area designations and bandwidth assignments. The mandate also requires it to promote an equitable distribution of licenses and services among geographic areas and economic opportunity for a wide variety of applicants including designated entities. Another aspect of the mandate directs the Commission not to base regulations on alternative payment arrangements "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding."

NTCA recommends that the Commission allow partitioning of the licensing areas adopted in the Second Report and Order of the PCS licensing proceeding to accomplish the Congressional objectives. Without partitioning, rural areas will most likely be the last to receive service. Rural telephone companies have an interest in bringing service to the communities they traditionally serve and should be given the opportunity to provide service to these areas, particularly since service to the areas may be delayed for a long time as a result of the build-out

requirements and licensing of huge territories based on Rand McNally trading areas. The Commission should also adopt comprehensive rules with a flexible definition of "rural telephone company" that takes into account the rurality of areas, as well as the size of the companies. In addition, since the set-aside of Blocks C and D alone will not accomplish the legislative objectives, the Commission should eliminate upfront deposits and allow rural telephone companies to use royalties as well as installment payments to pay out bid prices. These measures, as well as credits and discounts, should be allowed when rural telephone companies bid in any block for territory overlapping their wireline service area. Other rules that adversely affect small companies should not be adopted. These include use of a "letter-perfect" standard for the short form application or the requirement that a long form be used prior to bidding, and the NTIA's suggestion for use of an "electronic iterative combinatorial auction" (EICA). NTCA recommends against adoption of these latter three requirements because they are unnecessary burdens that will handicap small companies without benefitting the public.

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INTRODUCTION

The National Telephone Cooperative Association ("NTCA") submits these Reply Comments to the initial comments filed on November 10, in response to the Notice of Proposed Rulemaking, FCC 93-451, released on October 22, 1993 ("NPRM").

NTCA is a national association of approximately 500 small local exchange carriers ("LECs") providing telecommunications services to interexchange carriers and subscribers throughout rural America. NTCA filed initial comments in this proceeding. The Association has been actively involved in issues related to the provision of services to rural areas for nearly 40 years.

DISCUSSION

I. THERE IS WIDE AGREEMENT THAT THE COMMISSION SHOULD ADOPT PREFERENTIAL MEASURES THAT WILL ALLOW FOR THE QUICK DEPLOYMENT OF PERSONAL COMMUNICATIONS SERVICES ("PCS") IN RURAL AREAS.

A. Most Parties Agree That The Proposed Set-Aside Of Blocks C and D Is Needed To Achieve The Purposes Of The Amended Communications Act.

There is wide agreement and support for the various alternative preferential measures the Commission proposes to use to fulfill the mandates in new Subsections 309(j)(3) & (4) of the Communications Act.¹ Most parties commenting on the issue agree with the set-aside of Blocks C & D, the use of installment payments and other preferential measures in conjunction with auctions of these blocks to designated entities.

However, BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. ("BellSouth") and Rochester Telephone Corporation ("Rochester") suggest that the Commission should restrict itself to a single option to achieve the legislative intent.² BellSouth asserts that the set-aside of Blocks C and D is contrary to legislative

¹ Many parties agree that the Commission should employ set-asides, as well as other preferential measures, including installment payments, tax certificates and other methods for ensuring that designated entities including rural telcos receive licenses. See, e.g., Small Telephone Companies of Louisiana at 11-20; Alliance of Rural Area Telephone and Cellular Service Providers at 2; National Rural Telecom Association ("NRTA") at 8-11; Chickasaw Telephone Company at 6; Cellular Service, Inc., at 8; Citizens Utilities Company at 6; and GVNW Inc./Management ("GVNW") at 5-6.

² BellSouth at 22.

intent.³ Rochester, on the other hand, believes that set-asides alone should adequately address Congress' concerns.⁴ BellSouth and Rochester are both incorrect. NTCA believes the legislation clearly contemplates set-asides as well as a variety of other measures to achieve the Congressional objectives. Congress was aware of set-asides but did not rule them out. Instead, it left to the Commission, the duty of designing systems of competitive bidding that would achieve the objective of promoting economic opportunity and ensuring the dissemination of licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.⁵ Moreover, it clearly contemplated set-asides by directing the Commission to consider in prescribing regulations to implement this objective "the use of tax certificates, bidding preferences, and other procedures" to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services.⁶ Congress also explicitly directed the Commission to ". . . prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services

³ BellSouth at 20-23.

⁴ Rochester at 15.

⁵ 47 U.S.C. Subsection 309(j)(3)(B). Subsection 309(j) of the Communications Act, added by Subsection 6002 of the Omnibus Budget Act of 1993, P.L. 103-66, Title VI, 107 STAT. 387, will be hereafter referred to as Subsection 309(j).

⁶ Subsection 309(j)(4)(D).

among geographic areas, (ii) economic opportunity for a wide variety of applicants including [listing designated entities]" ⁷ These legislative directives indicate that Congress viewed specific bandwidth assignments such as the set-aside of Blocks C & D as legitimate means to accomplish its objective of avoiding the concentration of licenses in a few hands and speeding the delivery of services across the country, including rural areas.

The necessity of set-asides is borne out by the comments filed in this proceeding. Many parties have pointed out that set-asides and other measures are clearly necessary to achieve the legislative objective that rural companies have the opportunity to provide service to rural areas.⁸ Importantly, the National Telecommunications and Information Administration ("NTIA") supports set-asides. NTIA states that its support is based on the recognition that capital constrained firms like the designated entities are unlikely to win bids in an open bid market.⁹ In fact, BellSouth, while arguing against set-asides, makes a point which illustrates why set-asides are needed, i.e., the Commission's proposal to allow combinatorial bidding is likely to prevent small entrepreneurs from participating in the

⁷ Subsection 309(j)(4)(C).

⁸ See, n.1, supra; also, Telephone Association of Michigan at 9; Cellular Service, Inc. at 6; The Minority PCS Coalition at 6; and Joint Comments of Rocky Mountain Telecommunications Association and Western Rural Telephone Association, at 9-10.

⁹ NTIA at 26.

service even if they place the highest value on an individual license for which a combinatorial bid is accepted.¹⁰

In its comments, GVNW, a consultant to 200 independent telephone companies calls attention to yet another reason why set-asides are needed to achieve the legislative objective of bringing spectrum based services to rural areas without delay. GVNW believes the adoption of large licensing areas such as the MTAs and BTAs along with the "must build" rules, as framed, could allow licensees to delay or avoid bringing service to less populated rural areas such as those served with wireline service by the small telephone companies.¹¹ NTCA agrees. In view of the inherent disadvantages placed on rural companies as a result of the licensing of large areas, build out requirements and the use of bidding schemes that favor "deep pockets," the set-aside of Blocks C & D, as well as other preferential measures, are needed to assure achievement of the Congressional objectives to ensure economic opportunity for rural telephone companies and quick delivery of spectrum-based services to rural areas.

B. The Commission Should Adopt Rules That Reduce Regulatory Burdens And Include Preferential Measures To Enable The Wide Dissemination Of Licenses To Capital-Constrained Companies.

The Rocky Mountain Telecommunications Association requests that the Commission adopt these alternatives in addition to setting aside Blocks C and D: (1) bid multipliers whereby every

¹⁰ BellSouth at 7.

¹¹ GVNW at 2.

dollar bid by a designated entity is multiplied by a factor such as 1.5; (2) installment payments; (3) payment schedules that allow a portion of the bid to be paid by royalties derived from revenues; (4) tax certificates; (5) rules that allow designated entities to self-certify their qualifications; and (6) a distress sales policy.¹² NTCA supports Rocky Mountain's position. Only a variety of cumulative measures like these will satisfy the public interest. As stated above, the public interest, and the multiple Congressional goals of Subsection 309(j) are in potential jeopardy if the Commission adopts policies favoring the aggregation of licenses and the raising of Federal revenues.¹³ Only a range of alternatives and their cumulative availability to particular applicants and areas will assure the deployment of services throughout the country and the participation in the services by a wide variety of applicants.

In addition, the costs of deploying PCS will make it particularly necessary that the Commission adopt alternatives that encourage the formation of consortia that include designated entities. For that reason, NTCA supports the recommendations of various parties who suggest the availability of pro rata

¹² Rocky Mountain at 16-19.

¹³ Congress did not place on the FCC the burden of supporting itself or financing any portion of the Federal debt, only the duty to raise some revenues from the sale of the spectrum so as to return to the public "a portion of the value of the public spectrum resource made available for commercial use" Subsection 309(j)(c).

preferences for consortia that include designated entities.¹⁴ NTCA believes the pro rata treatment will be needed to ensure financial backing of the type required to build PCS systems.

A number of parties urge the Commission to abandon the use of Long Form 401 and the "letter-perfect" standard.¹⁵ Pacific Bell and Nevada Bell correctly point out that the "letter-perfect" standard is a vestige of lotteries.¹⁶ Rural Cellular Association ("RCA") states that the "letter-perfect" standard is too severe and an unnecessary deterrent to speculation in a scheme involving auctions where the good faith of applicants will be demonstrated by participation in an expensive bidding process.¹⁷ NTCA agrees that the Commission should use the initial short form "standard of intention to bid" and only require the long form of auction winners. In addition, as RCA suggests, the Commission should allow applicants to amend long form applications to correct minor errors. There is no need for the Commission to play trivial "gotcha" in an administrative procedure where real money is involved and the high bidders get the prize.

¹⁴ See, e.g., Rural Telephone Company at 2; and Western Wireless, Inc. at 3.

¹⁵ See, e.g., Cellular Telecommunications Industry Association at 27-29; Wisconsin Wireless at 3; BellSouth at 38; and RCA at 20.

¹⁶ Pacific at 23.

¹⁷ RCA at 21.

NTCA supports the range of preferential measures suggested by the Commission's Small Business Advisory Committee and contained in the Committee Report to the Commission.¹⁸ These measures are also strongly supported by NTIA. NTCA is encouraged by NTIA's support of the measures. In NTCA's view, the measures are essential to attain the Administrations's telecommunications goals outlined in the Agenda for Action. Preferential measures will assure realization of the Administration's goal to "develop policies to ensure that entrepreneurs and small, rural, minority- and women-owned businesses are able to participate in spectrum auctions."¹⁹

NTCA believes the additional preferential measures supported by NTIA, REA and the SBA are an absolutely necessary ingredient to the attainment of the range of Congressional objectives.²⁰ These include the intent that (1) rural areas receive spectrum-based services in a timely fashion; (2) rural telephone companies be allowed the economic opportunity to provide the spectrum-based services; (3) concentration of licenses be avoided; and (4) licenses be disseminated to a wide variety of applicants.

¹⁸ See, Report of the Committee, appended as Appendix C to the Second Report and Order in the Gen. Docket No. 90-314, RM-7140, RM-7175 and RM-7618 (released October 22, 1993) ("Second Report and Order").

¹⁹ See, The National Information Infrastructure Agenda for Action, Information Infrastructure Task Force of the National Telecommunications Information Administration (September 15, 1993) at 10.

²⁰ See, Subsection 309(j)(3) & (4).

C. The Commission Should Adopt A Definition Of Rural Telephone Company That Is Consistent With The Dual Congressional Intent As Applied To Rural Areas.

In its prior comments, NTCA proposed that the Commission define a rural telephone company as a local exchange carrier that: (a) provides telephone exchange service by wire to 10,000 or fewer access lines in a Study Area, or (b) that provides local exchange service to a geographic area within the license area that either does not include any incorporated place of 10,000, any part of such a place or any Census defined territory included in an urbanized area.

A number of parties agree with the basic tenant of that definition.²¹ Others variously argue for a limit of 50,000 or 25,000 access lines. While NTCA pointed out in its Comments that various Commission rules categorize carriers on the basis of access lines alone, it believes a more flexible approach to defining a rural telephone company on the basis of the size of the company or the rurality of its wireline service area is best suited to achieve the Congressional purposes in Subsection 309(j). These purposes are to promote economic opportunity for rural companies and other designated entities,²² and to "foster the development and rapid deployment of new technologies, products, and services for the benefit of the

²¹ See, Comments of NRTA at 6; OPASTCO at 6; Alliance of Rural Area Telephone & Cellular Providers at 3; and GTE at 13.

²² Subsection 309(j)(3)(B).

public, including those residing in rural areas"²³ In keeping with these objectives, NTCA agrees with parties who take the position that rural telephone companies should be allowed to bid outside their telephone service area.²⁴ It also supports proposals that would allow rural telephone companies to obtain Block A and B licenses enabling them to serve their partitioned wireline telephone service area alone or in conjunction with Block A and B MTA licensees. It believes, however, that rural telcos should be eligible for preferential treatment as rural telephone companies only when bidding for licenses that overlap or are congruent with the rural telco's wireless service area. Several parties agree with this position.²⁵

Because sole reliance on the automatic cut off for qualifying rural companies at 25,000 lines as proposed by Rochester²⁶ or at the 50,000 lines suggested by others,²⁷ does not meet these objectives, NTCA disagrees with these proposals, unless the alternative rural area definition, (i.e., under 10,000 population) is added.

In its prior comments, NTCA asked the Commission to allow pre-bid contracts that would permit the partitioning of Block C &

²³ Subsection 309(j)(3)(A) [Emphasis added].

²⁴ See, e.g., Rural Cellular Association at 15.

²⁵ See, e.g., Comments of American Personal Communications at 6; General Communications, Inc. at 13; and PMN, Inc. at 6.

²⁶ Rochester at 15, n.31.

²⁷ RCA Comments at 13; and GVNW at 5.

D licenses so that rural telephone companies can operate and control a PCS license in their land line service area. NTCA stated that a rule permitting partitioning is necessary in light of the Commission's policy favoring aggregation and large size licensing areas.²⁸ Other parties have made the similar request that the Commission allow partitioning, GVNW, e.g., believes that partitioning is needed to accomplish the goals of Subsection 309(j). It proposes a plan under which rural telephone companies that lose the bidding for the set-aside blocks would be permitted to carve out their service area and pay a discounted (70 percent) pro rata portion of the auction cost per population.²⁹ U.S. Intelco Networks, Inc. also supports a proposal that would allow rural telephone companies that qualify as designated entities to apply for a partition of the PCS licensing market area corresponding to their telephone service area prior to construction by the successful bidders. It also argues for payment of a pro rata portion of the winning bid based upon the percentage of the total population in the licensed area within the telephone service area.³⁰ NTCA believes the Commission should adopt a rule allowing some method of partitioning similar to that recommended by U.S. Intelco. NTCA

²⁸ NTCA Comments at 13.

²⁹ GVNW at 4-6. Rocky Mountain Telecommunications Association suggests this alternative also, at 7, 11, and 12.

³⁰ U.S. Intelco at 16-17.

believes it will be necessary to allow partitioning of licenses awarded in all blocks to assure the timely delivery of services to rural areas.

As GVNW has pointed out, large license areas and the Commission's build-out rules will allow licensees to concentrate resources in heavily populated metropolitan areas to the detriment of the rural areas traditionally provided wireline service by small and independent telephone companies. GVNW's exhibits illustrate the problem with the example of seven western MTAs. GVNW's exhibits show that the largest portion of the population resides in a small portion of the geographic area in the seven MTAs it analyzed. As a result, large rural geographic areas will not need to be built to meet the must-build requirements and rural areas will receive service last, if ever, unless the Commission adjusts its licensing rules.

GVNW's examples illustrate why the Commission must consider a partitioning mechanism to assure quick deployment of service to rural areas. NTCA believes that partitioning of the MTAs, as well as BTAs, is necessary in the view of the expected efficiencies that will follow the award of lower frequency 30 MHz MTAs to larger firms with the ability to shape the technology and the inherent disadvantages to designated entities eligible for Block C, a 20 MHz block often crowded with incumbent microwave users.³¹

³¹ See, Second Report and Order at para. 58.

D. Rural Telephone Companies With Attributable Interests Should Be Allowed To Bid For Block D Licenses And Receive The Preferences Accorded Other Rural Telephone Companies Bidding On That Block.

NTCA also believes that the Commission can best fulfill the Act's dual mandate of bringing spectrum based services to rural areas and providing economic opportunity to rural companies by modifying the restrictions imposed on cellular carriers in the Second Report and Order in Gen. Docket No. 90-314. NTCA believes that rural telcos with attributable interest in cellular, as defined in the Second Report and Order, should at least be eligible for preferential treatment in Block D. This would place the companies on an equal footing with other cellular companies eligible for 10 MHz in Blocks E, F, and G. It would also promote the goals of Subsection 309(j) by allowing the rural companies with varying cellular interests to obtain access to the spectrum and provide PCS to rural areas as a complement to cellular service. Since each area will have up to six other PCS licenses, plus another cellular, and, perhaps an SMR, there should be no dearth of potential competitors to rural telephone company cellular providers that operate on Block D.

II. THE COMMISSION SHOULD PROCEED CAUTIOUSLY BEFORE ADOPTING SOME OF THE SUGGESTIONS PROPOSED BY THE NTIA.

A. The Commission Should Not Set A Reserve Price Solely For Licenses In Rural Areas.

The NTIA believes that use of either a reserve price or royalty payments could be viable alternatives against awarding licenses for trivial amounts. NTCA also supports royalty payments as an alternative for designated entities but does not

agree that royalties should be made available solely for the purpose of obtaining a reserve price. The upfront or initial payment NTIA suggests for use in conjunction with royalties should not be employed as a device to set a reserve price which would be unfair.

It would be unfair, for example, to arbitrarily assign to BTA licenses for Blocks C and D in areas that are largely more sparsely populated overall or less populated totally, certain monetary values to assure Federal revenue yields comparable to yields for more lucrative urban areas. NTIA itself acknowledges that a number of factors will make PCS licenses heterogeneous commodities. The differences it acknowledges demonstrate the potential for unfairness. These include differences in sizes of geographic areas, population and potential demand for the service, and differences in the number of incumbent or fixed microwave users on the block to be assigned. If the Commission sets a reservation price, it should take these factors into account and recognize the vast differences between values based on these factors.

NTCA agrees with NTIA that royalties are appropriate but royalties should not be used solely in connection with efforts to guarantee the government a minimum reserve price. NTCA believes the primary purpose Congress contemplated in authorizing royalties was the facilitation of its purpose that the public receive spectrum-based services and that a wide variety of applicants receive licenses rather than the assurance that these

applicants provide the Treasury a sum certain in Federal revenues. The royalty approach should simply and only be a payment method for the auction price. This payment method is simply a flexible line of credit for which the "loan" is the auction price and the set payments are based on the firm's revenues or net income. In theory, the scheduled loan repayments will not overburden the rural PCS firm during its start-up years and no, or very little, upfront payment will be necessary.

B. The Commission Should Not Adopt The EICA Auction Mechanism.

The NTIA proposes an "electronic iterative combinatorial auction" (EICA). Under the mechanism, bidders would be allowed to submit simultaneous electronic bids on any combination of broadband PCS licenses using computers. They would have the opportunity to revise their bids or submit initial bids in response to the actions of other bidders. EICA is experimental and risky to employ to accomplish the purposes of the Act. No sufficient record is available to assess its reliability regarding sale of the spectrum in the regulated environment of the evolving PCS technology. For example, there is insufficient record to determine whether the method will provide yet another unfair advantage to "deep pockets" with the capability to analyze ad infinitum the processes that will be involved and apply unlimited resources to manipulating this mechanism at the expense of smaller firms and those unfamiliar with this procedure. The unpredictability could be somewhat analogous to the effect of software driven trading schemes directed by computers in major

commodities and stock exchanges. The process suggested by NTIA is too risky and the benefits hypothesized to jeopardize such a major undertaking by the Commission.

III. CONCLUSION

For the reasons stated herein, the Commission should adopt the competitive bidding measures outlined by NTCA. These measures are necessary to assure that wireless services will be available to rural subscribers. These provisions will also facilitate the availability of spectrum to those service providers that have demonstrated the greatest commitment to rural America and are in the best position to provide wireless services to rural subscribers.

Respectfully submitted,

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